

FAMILY COURT OF AUSTRALIA

KAZAMA & BRITTON

[2013] FamCA 4

FAMILY LAW – DE FACTO RELATIONSHIP – where the applicant seeks a declaration under s 90RD that the parties were in a de facto relationship – where the parties maintained separate residences but spent significant time together at the respondent's residence – where the respondent sponsored the applicant to immigrate to Australia and made representations to the Department of Immigration that the parties were in a de facto relationship – discussion of the principles in *Nelson v Nelson* (1995) 184 CLR 538 – where evidence that would contradict statements made by the respondent to the Department was not accepted – the applicant's version of the dates of cohabitation is accepted – in the alternative, the applicant's evidence is preferred leading to the same outcome

Family Law Act 1975 (Cth)

Dawes & Dawes (1990) FLC 92-108

Elias & Elias (1977) FLC 90-267

Ferraro & Ferraro (1993) FLC 92-335

Jonah & White [2011] FamCA 221

Jordan & Jordan (1997) FLC 92-736

Lee Steere & Lee Steere (1985) FLC 91-626

Moby & Schulter (2010) FLC 93-447

Nelson v Nelson (1995) 184 CLR 538

APPLICANT:

Ms Kazama

RESPONDENT:

Mr Britton

FILE NUMBER:

CSC 543 of 2011

DATE DELIVERED:

15 January 2013

PLACE DELIVERED:

Sydney

PLACE HEARD:

Cairns

JUDGMENT OF:

Watts J

HEARING DATE:

5 - 6 November 2012

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Mr Trevino
SOLICITOR FOR THE APPLICANT:	Murray Lyons Solicitors
SOLICITOR FOR THE RESPONDENT:	Litigant in person

ORDERS

(i) (Orders made 6.11.2012)

DECLARATION AND NOTATION:

1. Pursuant to s 90RD(2)(a) FLA, I declare that a de facto relationship existed between the Applicant and the Respondent between 9 November 2002 and 9 September 2009.
2. I will publish my reasons at a later date.

ORDERS AND NOTATIONS:

3. The Applicant's costs of this hearing be reserved.
4. Within 14 days the Applicant file and serve an updated financial statement.
5. Within 14 days the Respondent file and serve a financial statement together with an affidavit setting out any additional information that he wishes to give about his financial position.
6. Within 14 days the Respondent give a written authority to the lawyers for the Applicant so they can speak to and receive documents from Mr A, ANZ Bank.
7. Both parties attend a financial conference with the Registrar on 6 December 2012 at 2pm.
8. This matter be adjourned for a telephone mention on 13 December 2012 at 9am Qld (10am NSW).
9. Should the matter remain unresolved, the matter will be set down for hearing commencing 14 March 2013 for 2 days.
10. The Respondent is granted a certificate under s 128 of the *Evidence Act 1995* (Cth) regarding evidence given in these proceedings by him on 6 November 2012 concerning the Respondent signing a Form 40SP with the Department of Immigration and Multicultural Affairs (as it then was) on 11 September 2006. The Registry Manager is to prepare for signature the certificate in accordance

with form 1 of the Evidence Regulations annexing the relevant parts of the transcript.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Kazama & Britton* has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth)

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: CSC 543 of 2011

Ms Kazama

Applicant

And

Mr Britton

Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. On 6 November 2012 I made a declaration in this matter, pursuant to s 90RD(2)(a) *Family Law Act 1975* (Cth) (“FLA”). At that time I indicated I would publish my reasons at a later date and I now provide them.
2. The applicant has applied for a declaration pursuant to s 90RD(2)(a) FLA that a de facto relationship existed between the applicant and respondent between 9 November 2002 and 9 September 2009. The respondent was prepared to concede that a de facto relationship existed between 2006 and 2009. This concession was made after the respondent was faced, during cross examination, with a document he had signed which was in the file of the Department of Immigration and Citizenship and notes of a subsequent interview between himself and a Departmental officer (these are discussed in more detail below). The date of the commencement of the de facto relationship remained in contention.
3. The applicant conceded at the commencement of the hearing that the parties had never established a common residence and had maintained separate residences throughout the period in which she asserted there was a de facto relationship. The applicant’s case was that the parties spent significant time together at the respondent’s residence in north Queensland town P.

DOCUMENTS RELIED UPON

4. The documents relied upon by the parties are set out in Schedule 1.

5. In addition the whole of documents produced by the Department of Immigration and Citizenship (then the Department of Immigration & Multicultural Affairs) (“the Department”) relating to applications made by the applicant to that department for visas and permanent residence status were tendered (exhibit 2).
6. The respondent also tended a schedule of payments that he had made on behalf of the applicant (exhibit 3) which schedule is also contained in the documents produced by the Department (exhibit 2).

SHORT HISTORY

7. The respondent was born in 1926 and is currently 86 years of age.
8. The applicant was born in Japan in 1952 and is currently 60 years of age.
9. The applicant asserted that a de facto relationship commenced on 9 November 2002. The respondent belatedly asserted that a de facto relationship commenced in 2006.
10. The parties agreed that the relationship ended on 9 September 2009.

CREDIT

11. The versions of the relationship between the parties varied significantly. The difficulty for the respondent in his version is that it was inconsistent with a document entitled “Form 40SP” that he had signed on 11 September 2006. It was also inconsistent with notes of an interview between himself and a Departmental officer. That interview took place on 21 August 2008.
12. Ultimately the respondent abandoned assertions made in his sworn evidence by conceding, at least partially, that in fact a relationship had been in existence since 2006.
13. In the circumstances I am unable to place any great reliance upon the version given by the respondent. The applicant’s version has been corroborated in part by the witnesses that she called. Although I may have some doubts about some of the evidence given in the applicant’s case, I generally accept the version of events presented by the applicant.

THE FORM 40SP

14. The respondent signed a document entitled “Sponsorship for a partner to migrate to Australia” on 11 September 2006. Immediately above his signature is an undertaking which starts with a warning that under the *Migration Act 1958* (Cth) there are penalties for deliberately giving false or misleading information in the document with a maximum penalty of ten years imprisonment and/or a \$110,000 fine.
15. Part of the undertaking includes the following:

I declare that the information I have supplied in this form is complete, correct and up to date in every detail.

I am aware that any person who provides false or misleading information or who deceives or misleads or who presents a forged document to an Australian Government official may be prosecuted.

16. Question 9 on the form asks:

When and where did you and your partner first meet?

The information on the document is 22 October 1997 at W School, R.

17. Question 10 asks:

How long after you met did you and your partner begin a relationship?

The answer is three years and eight months (this would in fact place the beginning of the relationship at June 2001).

18. Question 11 asks:

When did you and your partner make the decision that you both:

Wanted to commit to a long term spouse or interdependent relationship; or

Intended to marry each other?

The answer given is 19 November 2002.

19. Question 12 asks:

When and where did your partner begin a spouse or interdependent relationship with your partner?

20. The question explains that a spouse or interdependent relationship is a relationship between a couple who have a mutual commitment to a shared life to the exclusion of any other spouse relationships or any other interdependent relationships and the relationship between them is genuine and continuing and they live together; or do not live separately and apart on a permanent basis. The answer given to this question is 19 November 2002 at P

21. Question 13 asks:

Who are you sponsoring?

The information selected is “de facto spouse” and the subsequent question then asked was, “date de facto spouse relationship commenced”. The answer given was 19 November 2002.

22. Question 47 asks:

Will the person you are sponsoring be living with you?

The response given was “yes”.

23. It is clear that the respondent had assistance when completing the form. That assistance was provided by Mr Z who is a migration agent.
24. The respondent had demonstrated in other areas that he carefully looks at documents. He had had the opportunity on two occasions to visit the registry to inspect the Departmental files. Nonetheless he seemed somewhat surprised during the hearing when the contents of the document that he had signed were drawn to his attention.

NOTES OF THE INTERVIEW BETWEEN MS L, A DEPARTMENTAL OFFICER AND THE RESPONDENT ON 21 AUGUST 2008

25. Given that there are only a couple of pages, I will set them out in full (emphasis added):

[Mr Britton] stated that he and [Ms Kazama] met at the school attended by their respective sons. The boys were friends and both played sport. [Ms Kazama] was living at [W School] and became a friend of [Mr Britton's] wife [Ms B] and they attended some functions. [Mr Britton's] wife [Ms B] decided to do some courses at TAFE so he looked after his sons as she needed to get help from other students. He and [Ms Kazama] often attended the boys' games and would talk on the sidelines. [Mr Britton] invited them to go for a meal after the game and then this happened regularly.

[Ms Kazama] and her children were living at [W School] and the facilities were poor so [Mr Britton and his wife] encouraged her to move out and get her own place which she did. [Mr Britton and his wife] helped [Ms Kazama] with furniture and some things.

[Mr Britton's] wife finished her course and became very restless so she went to [a] University and did another course. During this time he was finding it difficult to run his business and look after the boys. [Ms B] used to go to functions with her university friends and he was never invited. He stated that he told [Ms B] he wished to accompany her to a function, which he did. He stated that she ignored him most of the night and never introduced him as her husband. Later she told him he was too old for her. (At this stage they were living at [R] Street, [R] which was the family home).

[Mr Britton] stated that he had become close to [Ms Kazama] around this time and **in November 2002 he moved to his property at [P]** and his sons used to spend weekends with him.

This is when he and [Ms Kazama] began a relationship. There was no contact between the children of each partner with the children of the other partner, in that [Mr Britton] never visited [Ms Kazama] at her place when her children were with her and she never visited him when his children were with him. He stated that his wife was very bitter and convinced his children (now

aged 18 & 15) that [Ms Kazama] was a wicked woman and that [Mr Britton] will cease to care for his children if the parents get divorced.

He stated that his younger son stays with him most weekends so [Ms Kazama] returns to her house at [X]. [Mr Britton] stated that his son is now aware that [Mr Britton] and [Ms Kazama] are in a relationship.

Financial

[Mr Britton] pays [Ms Kazama] \$500 per week by cheque and she uses this to buy groceries and personal items – he pays for everything else including a car.

[Mr Britton] also stated that he has been paying for some time for [Ms Kazama's] daughter to attend university ... and providing fully for her. (From copies of invoices attached it appears that [Mr Britton] has been paying for fees for [Ms K] since January 2007). He also bought [Ms K] a car.

[Mr Britton] stated that [Ms Kazama's] husband used to pay for [Ms Kazama's] daughter's university fees but he retired and could not afford to continue.

[Mr Britton] advised that [Ms Kazama's] husband in Japan is now paying for the son to attend university in Japan.

There are no joint bank accounts.

[Mr Britton] stated that [Ms Kazama] is included in his Will since May 2008 but she does not know this.

Household

[Mr Britton] owns a 4 br villa at [a] resort in [P] and this is where he has resided since 2002 when he left the family home at [R]. He stated that [Ms Kazama] does everything in the villa and looks after him very well. (Cleans, washes & irons).

He advised that [Ms Kazama] makes heaps of food for when his sons come to stay with him however she still cannot be at his place when the boys come to stay.

[Mr Britton] stated that [Ms Kazama] goes to visit her daughter ... about 3 times per year to cook for the daughter and help her as the daughter is so tied up in her studies (...) that she neglects herself in regard to eating.

Social

[Mr Britton] said they used to go to school events.

He stated that they go to dinner with [Mr C] and his wife (888 declarant) but cannot recall when they last went out with these people. He also stated that they have lunch with friends sometimes and as he has a boat they go to the Great Barrier Reef occasionally with friends. He and [Ms Kazama] go bike riding together and play golf.

He advised that they have recently been on a trip [overseas] (photos attached).

Future

Want to travel to [overseas] and stay happy in their lives.

[Mr Britton] stated he will divorce his wife when the final settlement comes thru. He stated that to date the legal costs in relation to the settlement have cost in excess of \$1,000,000 and he feels his wife just wants to keep going with obstacles to the settlement so that it costs more.

[Mr Britton] stated he will marry [Ms Kazama] if it is important to her but he wants to protect his children's inheritance.

Assessment

Discussed evidence of relationship with clients and Migration Agent. Suggested certain types of evidence they may wish to provide to prove de-facto relationship from 11 September 2005, as evidence on file does not support this. Client and agent agreed to provide evidence.

Based on interview as at 21/8/2008, I have no reason to doubt that [Ms Kazama] and [Mr Britton] are in a genuine and continuing relationship as per Reg.1.15A, however as this is a de-facto application evidence needs to be supplied to prove relationship existed from 11/9/2005.

NOTE: [Ms Kazama's] son, ... is presently residing in Japan whilst attending University & is being supported by his father. Counselling in regard to this.

26. The Department's interest in establishing that a relationship existed for at least one year prior to the lodgement of the document entitled "Sponsorship for a partner to migrate to Australia" related to a statutory requirement (see Migration Regulations 1994 (Cth) Reg 2.03A(3), and Department of Immigration and Citizenship: "De Facto Eligibility" at <http://www.immi.gov.au/migrants/partners/partner/820-801/eligibility-defacto.htm>). It is not a reference to when the parties say the relationship actually started.

FINDINGS ABOUT THE PARTIES' HISTORY

27. The respondent was born in 1926 and is currently 86 years of age.
28. The applicant was born in Japan in 1952 and is currently 60 years of age.
29. The parties met on 22 October 1997 at a post-family members' party.
30. In paragraph 13 of her affidavit, the applicant asserts, and the respondent accepted, that the parties commenced a sexual relationship in January 1999. At that time the respondent was 72 years of age and the applicant was 47 years of age.

31. In November 2002 the respondent separated from his then wife and moved into a villa in the resort at P. I accept the applicant's evidence that she had a key card to the villa at the time. The applicant commenced going to the respondent's villa every day. The applicant performed cleaning, cooking and ironing duties for the respondent.
32. In 2002 the parties spent Christmas together. The applicant wrapped the respondent's Christmas presents to his children.
33. In 2003 the respondent concedes that he gave the applicant an opal ring. The respondent insists that it was of very little value. He does concede however that the applicant wore that ring on her wedding ring finger and it made her very happy to be able to wear that ring on her wedding ring finger.
34. In April 2003 the parties holidayed together in north Queensland for three days.
35. In July 2003 the parties attended the applicant's ... graduation party as a couple.
36. In 2003 the applicant commenced a personal services course and the respondent paid for that course. The applicant then commenced employment in personal services.
37. The parties during 2003 became family members of the N Golf Club and played socially. The parties attended the N Golf Club party together.
38. During 2003 the respondent paid for the maintenance of the applicant's motor vehicle.
39. In 2004 the parties travelled to Melbourne together to see the respondent's daughter, Ms S and her two daughters. The parties visited Mr H together. The parties lunched with Mr and Mrs C and visited them for lunch as a couple. The respondent expressed to the applicant that he wished to make an application for a marriage visa for the applicant. The applicant received a four year visa supported by her employer. The respondent paid the costs associated with that application for visa. The parties holidayed together at locations in south east Queensland and the respondent introduced the applicant as his partner. The applicant continued to regularly come and stay at the respondent's villa and the applicant continued to provide cleaning, cooking and ironing services. The applicant prepared pre-cooked meals for the respondent's children prior to them staying with the respondent. It is common ground that whilst the respondent's children were with him at the villa, the applicant was not present. The respondent paid for the applicant's medical fees; car insurance; repairs; telephone and the gardener at the property which she rented at X. The parties attended the ANZ Bank Christmas party together.
40. In 2005 the first of three property hearings (the decisions of two trial judges were overturned on appeal by the Full Court and a new trial was ordered on two occasions) between the respondent and his ex-wife led to what the respondent thought at the time were final orders. The respondent began to financially

maintain the applicant more regularly. The parties travelled to Sydney together for a holiday. The respondent introduced the applicant to some friends. The respondent called the applicant saying that he had been taken to Hospital. The applicant attended and told the nurse that she was the respondent's wife. The parties attended the V Company family Christmas party together and attended the ANZ Bank Christmas party. The parties also attended a Mercedes Benz party together.

41. In 2006 the respondent purchased a boat and the parties had afternoon tea with the previous owners of the boat on several occasions. The parties attended the P food festival as guests of the ANZ Bank. The respondent introduced the applicant to Mr M as his partner. The respondent's company leased a new property for the applicant to live in at X and maintained the payment of rent and outgoings on that property.
42. The respondent's grandson E and his girlfriend A helped the applicant move into the new X property. E and A stayed at the villa for approximately five months and during this time the applicant continued to do all the cleaning, cooking, ironing and other household duties at the villa. Sometimes E and A would cook. The parties, E and A would eat meals together.
43. When the applicant's son went to spend time with his father in Japan during school holidays, the applicant stayed at the villa.
44. In May the respondent purchased a wide screen television and Austar for the applicant and paid for the applicant to undertake a four week personal services course.
45. In July 2006 the parties commenced the process to obtain a spousal visa with the respondent as the applicant's sponsor. They attended upon Mr Z, an immigration agent.
46. On 11 September 2006 a spousal visa application was lodged with the Department of Immigration (a Form 47SP) by the applicant and her two children supported by a Form 40SP by the respondent (discussed above).
47. In October 2006 the parties attended Trinity Anglican School auction night as a couple.
48. In November 2006 they attended the T Foundation party as a couple.
49. In December 2006 the parties collected the respondent's niece, Ms I and her daughter Y, from the airport and had morning tea together. Ms I and Y stayed at the villa together with the applicant. The parties, Ms I and Y flew to the Sunshine Coast for a week long holiday and then flew to Sydney to spend time with the respondent's daughter Ms S and her family.
50. In 2007 the respondent commenced paying for Ms K's (the applicant's daughter) university fees. The parties attended P food carnival with Ms S and her partner.

51. In June 2007 the parties holidayed in England together, visiting friends and relatives of the respondent together. The applicant returned to Australia for her son's return from Japan. The respondent continued onto Europe. The parties then again met up in Southeast Asia and continued their holiday.
52. In 2007 the respondent commenced discussion with the applicant in respect of entering into a prenuptial agreement. The respondent told the applicant that he wished to provide for her and her children if he were to pass away. The parties also discussed purchasing a hospitality business for the applicant.
53. In August 2007 the respondent purchased a new motor vehicle for Ms K.
54. In October 2007 the parties holidayed in north Queensland.
55. In December 2007 the parties had Christmas lunch together at the P resort.
56. In 2008 the applicant's son went back to Japan to study. The applicant then stayed overnight at the villa more regularly and rarely returned to X except when the respondent's children stayed with him for holidays. The parties took a four week overseas holiday together.
57. In August 2008 the parties both had interviews with the Department to progress the application that had been lodged on 11 September 2006. The notes taken at the interview with the respondent are set out above.
58. The parties spent 2008/2009 New Years Eve together at a dinner at the P resort.
59. In 2009 Ms S and her family stayed at the villa and the applicant was there at that time. The applicant supervised tradespeople doing work at the villa.
60. In January 2009 the parties discussed living under the one roof together but decided against it in the context of continuing litigation with the respondent's ex wife.
61. On 10 April 2009 the applicant moved to D Avenue, X and leased that property in her own name. The respondent continued to pay the applicant's rent.
62. The respondent was divorced from his ex-wife on 23 May 2009 (see paragraph 78 of *LABH & HRBH* [2010] FamCA 110).
63. On 9 September 2009 the parties ended their relationship.

RELEVANT LEGISLATION

64. Section 4AA(1) FLA provides that a person is in a de facto relationship with another person if:
 - (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and

- (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.
65. Subsection 2 provides that the circumstances, referred to in s 4AA(1)(c) FLA to which regard should be had when working out if the parties have a relationship as a couple, include:

(a) The duration of the relationship

66. The parties commenced a sexual relationship in January 1999. The applicant does not assert that that was anything other than an affair until the respondent left his wife in November 2002. It is agreed that the parties separated in September 2009. The duration of the actual relationship between the parties was therefore from January 1999 to September 2009 (although the date of commencement of the de facto relationship is in contention).

(b) The nature and extent of their common residence

67. The unusual feature of this case is that throughout their de facto relationship, the parties maintained separate residences. I am satisfied however that they spent significant time together mainly at the respondent's residence in P and that the respondent did visit the applicant's home from time to time.
68. The applicant would not be present at the respondent's house when the respondent was spending time with his sons. The applicant would not stay over with the respondent whilst the respondent's son was at home. The primary time that they spent together occurred over school holiday periods whilst the applicant's son was in Japan spending time with his father. When the applicant's son moved to Japan to study, the applicant began spending more time at the respondent's residence.
69. The fact that the parties maintained separate residence does not preclude a finding that they were "living together as a couple on a genuine domestic basis" (see Murphy J in *Jonah & White* [2011] FamCA 221 at [65]).
70. The parties also spent significant time together on holidays.

(c) Whether a sexual relationship exists

71. Although it was not explicitly explored during the trial, I infer that the parties had an active sexual relationship between 1999 and September 2009.

(d) The degree of financial dependence or interdependence, and any arrangements for financial support, between them

72. The respondent offered significant financial support to the applicant and her family during the course of their relationship. The respondent paid the applicant's rent and other expenses. The respondent also paid for the applicant's daughter's university fees, rent and a motor vehicle. Exhibit 3 sets out a schedule of expenses which the respondent says that he paid between April 2005 and July

2008. Those expenses total \$135,209.94. This evidence will be relevant when considering what (if any) order is made for the alteration of property between the parties.

(e) The ownership, use and acquisition of their property

73. Although things may have changed since, during the time the parties were together, the respondent had significant assets. The applicant had very little by way of assets. The applicant had the use of the respondent's motor vehicle and lived in both a property rented by the respondent and a villa owned by the respondent.

(f) The degree of mutual commitment to a shared life

74. The respondent's comments recorded in the Departmental interview on 21 August 2008 are instructive. The parties had a mutual commitment to a shared life. The parties spent time with each other regularly and regularly took holidays together. The applicant proudly wore on her wedding ring finger the ring the respondent had given her. The parties spoke of celebrating the respondent's 100th birthday together at the golf club.

(g) Whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship

75. The relationship between the parties was not registered.

(h) The care and support of children

76. The parties have no children together. The applicant cooked and cleaned for the respondent's children and the respondent financially supported the applicant's daughter.

(i) The reputation and public aspects of the relationship

77. The parties were publicly open about their relationship. Both the parties' children were aware of the relationship. The parties attended public functions as a couple.

General comments

78. Section 4AA(3) FLA makes it clear that no particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship. Subsection 4 says that a court determining whether a de facto relationship exists is entitled to have regard to such matters and attach such weight to any matter as may seem appropriate to the court in the circumstances of the case.
79. Throughout most of the time of the relationship, the respondent was legally married to his ex wife. The period of the relationship claimed by the applicant however is during a period when the respondent was undoubtedly separated from his ex wife.

80. As Mushin J pointed out in *Moby & Schulter* (2010) FLC 93-447, the definition of de facto relationship in the *Family Law Act 1975* (Cth) is a very broad one.

SUBMISSION RELYING UPON NELSON'S CASE

81. Counsel for the applicant relied upon the document which the respondent had signed on 11 September 2006 and the notes of the interview with the respondent on 21 August 2008 to make a submission that the court should exercise a discretion to decline to accept from the respondent evidence that contradicted representations that he made to the Department in that statement and in that interview.
82. Counsel for the applicant relied upon the decision of Chisholm J in *Jordan & Jordan* (1997) FLC 92-736. In that case, his Honour departed from the principle enunciated in *Elias & Elias* (1977) FLC 90-267 and subsequent cases;¹ that a party who makes representations of fact to third parties and gains an advantage from doing so, cannot, in proceedings under s 79 FLA, lead evidence that contradicts those representations. Justice Chisholm held that the *Elias* principle was not based in estoppel, but derived from the provisions of the Family Law Act; ss 79(2), 75(2)(o) or in the principle of full and frank disclosure. His Honour reformulated the principle as being:

When a party has made representations of fact to third parties and has gained advantage from doing so, **it is open to the Court** in subsequent proceedings under s 79 of the Family Law Act to **decline to accept** from that party evidence which contradicts those representations. [emphasis added]

83. Counsel for the applicant also referred to the High Court decision of *Nelson v Nelson* (1995) 184 CLR 538. Although the decision in *Nelson* was handed down a week prior to the commencement of the hearing in *Jordan*, neither counsel referred Chisholm J to the High Court decision. In *Nelson*, the High Court unanimously allowed a mother to enforce her equitable interest in property that was registered in her children's names so that she could remain eligible for a financial benefit. In his separate judgment, McHugh J refers to the 'famous dictum' of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 where his Lordship said "no Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act". Justice McHugh then observed:

The principle contained in this dictum applies in both law and equity. But it is subject to exceptions which allow relief to be granted despite the presence of illegality. First, the courts will not refuse relief where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. Second, the courts will not refuse relief where the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member. Third, the courts will not refuse relief where an illegal agreement was induced by the defendant's fraud,

¹ For example, see *Lee Steere & Lee Steere* (1985) FLC 91-626; *Dawes & Dawes* (1990) FLC 92-108; *Ferraro & Ferraro* (1993) FLC 92-335.

oppression or undue influence. Fourth, the courts will not refuse relief where the illegal purpose has not been carried into effect. (citations omitted)

84. His Honour went on to say at paragraph 38 of his Judgment:

Accordingly, in my opinion, even if a case does not come within one of the four exceptions to the Holman dictum to which I have referred, courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless:

- (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or
- (b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;
(ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and
(iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies. (citations omitted)

85. As set out above, in the 2008 interview the respondent told the Departmental officer that his relationship with the applicant began in November 2002. I find that is a reference to their de facto relationship and not their sexual one as it is common ground their sexual relationship began in January 1999.

86. Counsel for the applicant submitted the application of the principles in *Nelson* in this case involves the balancing of the two public policy considerations. On the one hand discouraging the respondent from being able to provide information to the Department in an unlawful way and on the other hand, preventing the applicant from unjustly receiving an alteration of property interests in circumstances where she should not be entitled to one.

87. It is the respondent's case that what he told the Department, for the purpose of securing the applicant's immigration status, was false. If the true situation was that there was no de facto relationship at the commencement date stated by the respondent to the Department, then what the respondent did was an illegal act. To the extent relevant, that illegal act does not come within any of the four exceptions referred to by McHugh J in *Nelson*. Nevertheless, McHugh J goes on to say that legal and equitable rights should still be enforced unless certain conditions exist. In this case, the sanction against the respondent is to allow the applicant to pursue her claim under s 90SM FLA. That is not disproportionate to the seriousness of the illegality in which the respondent asserts he was involved. The statute (the immigration laws) has an object and policy to discourage by prosecution persons who provide false and misleading information to the Australian Government, and those immigration laws do not indicate that prosecution is to be the only sanction.

88. Consequently, when applying the principles set out by McHugh J in *Nelson*, I conclude in the circumstances of this case that it is appropriate for me to exercise

the discretion to decline to accept from the respondent evidence that would contradict the representations that he made to the Department, both in the Form 40SP and the interview in 2008.

89. Taking into account the statutory indicia, and notwithstanding the fact that the parties maintained separate residences, I am comfortably satisfied that a de facto relationship existed between the parties between 9 November 2002 and 9 September 2009.

ALTERNATE BASIS FOR THE DECISION

90. If I am incorrect in approaching the matter in that way, and the evidence which the respondent wishes to lead is admitted, I prefer the version of the facts given by the applicant, as corroborated by the information given by the respondent to the Department in preference to any contradictory evidence given by the respondent in his sworn evidence. Again, on that basis I find that a de facto relationship existed between the applicant and the respondent from 9 November 2002 to 9 September 2009.

I certify that the preceding ninety (90) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Watts delivered on 15 January 2013.

Associate:

Date: 15.1.2013

SCHEDULE 1

The Applicant relied upon:

1. Initiating Application filed 6.9.2011
2. Affidavit of applicant filed 6.9.2011
3. Affidavit of Ms M filed 16.3.2012
4. Affidavit of Ms C filed 23.3.2012
5. Affidavit of Ms O filed 26.3.2012
6. Affidavit of Mr C filed 23.3.2012
7. Affidavit of Ms K filed 30.3.2012
8. Affidavit of Mr M filed 4.5.2012

The Respondent relied upon:

9. Response to Initiating Application filed 2.1.2012
10. Affidavit of respondent dated 13.2.2012
11. Further affidavit of respondent sworn 30.3.2012
12. Affidavit of Ms U filed 13.2.2012
13. Affidavit of Mr SL filed 3.4.2012